(6)

No. 03-9168

In the Supreme Court of the United States

REGINALD SHEPARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, when a state offense embraces conduct that constitutes generic burglary under *Taylor* v. *United States*, 495 U.S. 575 (1990), as well as conduct that does not, certified copies of complaint applications and incorporated police reports that are contained in state court files may be used to determine that the defendant's guilty pleas were to generic "burglar[ies]" and thus "violent felon[ies]" within the meaning of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	15
Argument:	
The Armed Career Criminal Act permits district courts to consider reliable record evidence such as complaint applications and police reports in determining whether a defendant pleaded guilty to a burglary of a building and thus was convicted of a "violent felony"	18
A. *Taylor* permits courts to consider complaint applications and incorporated police reports to determine whether a guilty plea constituted an admission to burglary of a building	20
1. *Taylor* does not prohibit sentencing courts from considering guilty pleas under nongeneric burglary statutes as ACCA predicates	21
2. Examining the complaint application and incorporated police report to determine whether the guilty plea is an admission to unlawful entry of a building is consistent with *Taylor*	22
3. Considering court documents to determine if guilty pleas constitute admissions to unlawful entry of buildings does not create the problems *Taylor* sought to avoid	30

TABLE OF CONTENTS—Continued:

	Page
4. The court of appeals' test does not reverse the burden of proof for demonstrating the applicability of ACCA enhancements	33
B. The doctrine of constitutional doubt does not require adoption of petitioner's construction	35
C. The rule of lenity does not compel adoption of petitioner's construction	41
D. The continuing validity of *Almendarez-Torres* is not before this Court	43
Conclusion	46

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	44
Albernaz v. *United States*, 450 U.S. 333 (1981)	42
Almendarez-Torres v. *United States*, 523 U.S. 224 (1998)	17, 36, 37, 41, 43, 44, 45
Apprendi v. *New Jersey*, 530 U.S. 466 (2000)	17, 36, 37, 44, 45
Blakely v. *Washington*, 124 S. Ct. 2531 (2004)	37
Bowen v. *Massachusetts*, 487 U.S. 879 (1988)	27
Bradshaw v. *United States*, 537 U.S. 1049 (2002)	46
Brockett v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985)	27
Bulgin v. *United States*, 535 U.S. 1095 (2002)	46
Commonwealth v. *Brown*, 748 N.E.2d 972 (Mass. App. Ct. 2001)	26
Commonwealth v. *DelVerde*, 496 N.E.2d 1357 (Mass. 1986)	16, 25
Commonwealth v. *Durling*, 551 N.E.2d 1193 (Mass. 1990)	32
Commonwealth v. Gabin, No. 12069, 2001 WL 1566172 (Mass. Super. Ct. Dec. 7, 2001)	29

Cases—Continued: Page

Commonwealth v. *Grant*, 689 N.E.2d 1336 (Mass. (1998) 29
Commonwealth v. *Jones*, 799 N.E.2d 601 (Mass. App. Ct. 2003) 25
Commonwealth v. *Lopez*, 690 N.E.2d 809 (Mass. 1998) 29
Commonwealth v. *Rabb*, 725 N.E.2d 1036 (Mass. 2000) 24, 29
Delta Airlines, Inc. v. *August*, 450 U.S. 346 (1981) 36
Dretke v. *Haley*, 124 S. Ct. 1847 (2004) 37
Ford v. *United States*, 535 U.S. 1098 (2002) 46
Garcia-Saldivar v. *United States*, 124 S. Ct. 2067 (2004) 45
Garza-Garza v. *United States*, 124 S. Ct. 2096 (2004) 45
Graham v. *West Virginia*, 224 U.S. 616 (1912) 41
Gray v. *United States*, 536 U.S. 963 (2002) 46
Hagen v. *United States*, 537 U.S. 828 (2002) 46
Harris v. *United States*, 536 U.S. 545 (2002) 37
Hitt v. *Kansas*, 537 U.S. 1104 (2003) 45
Jones v. *United States*, 124 S. Ct. 1145 (2004) 45
Jones v. *United States*, 526 U.S. 227 (1999) 35, 45
Kamen v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90 (1991) 44
Lapsley v. *United States*, 124 S. Ct. 1409 (2004) 45
Lozano-Oritz v. *United States*, 535 U.S. 1113 (2002) 46
Luzardo v. *United States*, 536 U.S. 962 (2002) 46
Meza-Gonzalez v. *United States*, 124 S. Ct. 2017 (2004) 45
Nichols v. *United States*, 511 U.S. 738 (1994) 41
North Carolina v. *Alford*, 400 U.S. 25 (1970) 24
Old Chief v. *United States*, 519 U.S. 172 (1997) 45
Parke v. *Raley*, 506 U.S. 20 (1992) 16, 25

Cases—Continued: Page

Pennsylvania Dep't of Corrs. v. *Yeskey*, 524 U.S. 206 (1998) 44
Pineda-Cortes v. *United States*, 124 S. Ct. 2813 (2004) 45
Porter v. *Superintendant*, 417 N.E.2d 1199 (Mass. 1981) 24
Reyes v. *United States*, 535 U.S. 932 (2002) 46
Rust v. *Sullivan*, 500 U.S. 173 (1991) 37
Sanchez-Medina v. *United States*, 124 S. Ct. 1655 (2004) 45
Shepard v. *United States*, 534 U.S. 829 (2001) 3
Spencer v. *Texas*, 385 U.S. 554 (1967) 45
Stone v. *Powell*, 428 U.S. 465 (1976) 43
Taylor v. *United States*, 495 U.S. 575 (1990) ..... *passim*
TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 26
United States v. *Adams*, 91 F.3d 114 (11th Cir.), cert. denied, 519 U.S. 1047 (1996) 22
United States v. *Bean*, 537 U.S. 71 (2002) 25-26
United States v. *Broce*, 488 U.S. 563 (1989) 24
United States v. *Campbell*, 270 F.3d 702 (8th Cir. 2001), cert. denied, 535 U.S. 946 (2002) 40
United States v. *Coleman*, 158 F.3d 199 (4th Cir. 1998) 29
United States v. *Cook*, 26 F.3d 507 (4th Cir.), cert. denied, 513 U.S. 953 (1994) 22
United States v. *Cooper*, 375 F.3d 1041 (10th Cir. 2004) 40, 41
United States v. *Delgado*, 288 F.3d 49 (1st Cir.), cert. denied, 537 U.S. 1062 (2002) 32
United States v. *Demint*, 74 F.3d 876 (8th Cir.), cert. denied, 519 U.S. 951 (1996) 30
United States v. *DiPina*, 178 F.3d 68 (1st Cir. 1999) 27

Cases—Continued: Page

United States v. *Dueno*, 171 F.3d 3 (1st Cir. 1999) 33
United States v. *Gatewood*, 230 F.3d 186 (6th Cir. 2000), cert. denied, 534 U.S. 1107 (2002) 40
United States v. *Harris*, 964 F.2d 1234 (1st Cir. 1992) 12, 22, 23, 32, 39
United States v. *Hernandez*, 218 F.3d 272 (3d Cir. 2000) 22, 29
United States v. *Hill*, 131 F.3d 1056 (D.C. Cir. 1997) 22, 29
United States v. *Howze*, 343 F.3d 919 (7th Cir. 2003) 30
United States v. *Hudspeth*, 42 F.3d 1015 (7th Cir. 1994), cert. denied, 515 U.S. 1105 (1995) 30
United States v. *Kempis-Bonola*, 287 F.3d 669 (8th Cir.), cert. denied, 537 U.S. 914 (2002) 39-40
United States v. *Martinez-Garcia*, 268 F.3d 460 (7th Cir. 2001), cert. denied, 534 U.S. 1149 (2002) 40
United States v. *Morris*, 293 F.3d 1010 (7th Cir.), cert. denied, 537 U.S. 987 (2002) 40
United States v. *Palmer*, 68 F.3d 54 (2d Cir. 1995) 22, 29, 30
United States v. *Payton*, 918 F.2d 54 (8th Cir. 1990) 30
United States v. *Richardson*, 230 F.3d 1297 (11th Cir. 2000), cert. denied, 532 U.S. 983 (2001) 29-30
United States v. *Roberts*, 39 F.3d 10 (1st Cir. 1994) 27
United States v. *Sanders*, 377 F.3d 845 (8th Cir. 2004) 40, 41
United States v. *Santiago*, 268 F.3d 151 (2d Cir. 2001), cert. denied, 535 U.S. 1070 (2002) 18, 39, 40, 41
United States v. *Stone*, 306 F.3d 241 (5th Cir. 2002) 40
Yee v. *Escondido*, 503 U.S. 519 (1992) 43

Constitution, statutes, regulations and rules: Page

U.S. Const. Amend. V (Due Process Clause) 45
Armed Career Criminal Act of 1984, Pub. L. No. 98-473, Tit. II, §§ 1801-1803, 98 Stat. 2185 (codified at 18 U.S.C. App. 1202 (1982 & Supp. II 1984)) 3
18 U.S.C. App. 1202(c)(9) 4
Armed Career Criminal Act, as amended, Pub. L. No. 99-570, §§ 1401–1402, 100 Stat. 3207-39 to 3207-40, 18 U.S.C. 924(e) 3, 4, 42, 44
18 U.S.C. 924(e)(1) 11
18 U.S.C. 924(e)(2)(B) 5
8 U.S.C. 1326 40
8 U.S.C. 1326(b)(2) 40
18 U.S.C. 922(g) 3
18 U.S.C. 922(g)(1) 2, 6
18 U.S.C. 924(a)(2) 3
Mass. Gen. Laws ch. 266 (2002):
§ 16 ..... 7, 15, 24
§ 18 ..... 7, 15, 24
United States Sentencing Guidelines § 4B1.4 comment. (n.1) 42
Sup. Ct. R. 14.1(a) 18, 43
Mass. Dist./Mun. Ct. R. Crim. P. 27
Mass. R. Crim. P. 12(c)(5)(A) 25
Mass. Spec. R. of Dist. Ct. 211(A)(4) 29

Miscellaneous:

Eric Blumenson et al., *Massachusetts Criminal Practice* (1998):
Vol. 1 ..... 7, 8
Vol. 2 ..... 16, 26
132 Cong. Rec. 7697 (1986) 4
H.R. Rep. No. 1073, 98th Cong., 2d Sess. (1984) 3, 4
Mass. Super. Ct. Standing Order 2-86 ..... 8, 27
S. Rep. No. 190, 98th Cong., 1st Sess. (1983) 4

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 172-184) is reported at 348 F.3d 308. The opinion of the district court (J.A. 146-171) is reported at 181 F. Supp. 2d 14. A prior opinion of the court of appeals (J.A. 67-91) is reported at 231 F.3d 56. A prior opinion of the district court (J.A. 46-66) is reported at 125 F. Supp. 2d 562.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 2003. A petition for rehearing was denied on November 24, 2003 (Pet. App. B3). The petition for a writ of certiorari was filed on February 23, 2004, and was granted on June 21, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 924, provides in pertinent part:

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years * * *.
>
> (2) As used in this section—
>
> * * * * *
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year * * * that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT

Following his plea of guilty in the United States District Court for the District of Massachusetts, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). The district court sentenced him to a term of 46 months of imprisonment, to be followed by three years of supervised

release. J.A. 38, 41. On the government's appeal, the court of appeals vacated petitioner's sentence and remanded for resentencing. J.A. 67-91. This Court denied review. See *Shepard* v. *United States*, 534 U.S. 829 (2001). On remand, the district court imposed the same sentence. J.A. 138-139. On the government's second appeal, the court of appeals again vacated petitioner's sentence and remanded with directions to enhance petitioner's sentence under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e). J.A. 172-184.

1. a. This case involves application of the Armed Career Criminal Act of 1984 (ACCA), as amended, 18 U.S.C. 924(e), to enhance a sentence imposed for possession of a firearm by a felon in violation of 18 U.S.C. 922(g). A violation of Section 922(g) is ordinarily punishable by imprisonment for "not more than 10 years." 18 U.S.C. 924(a)(2). ACCA established an enhanced mandatory-minimum 15-year penalty for persons convicted of illegally possessing a firearm who have three previous convictions for robbery or burglary. Pub. L. No. 98-473, Tit. II, §§ 1801-1803, 98 Stat. 2185 (codified at 18 U.S.C. App. 1202 (1982 & Supp. II 1984)).

Congress enacted ACCA to supplement enforcement efforts against "career" criminals, in recognition of the fact that "a 'large percentage' of crimes of theft and violence 'are committed by a very small percentage of repeat offenders,' and that robbery and burglary are the crimes most frequently committed by these career criminals." *Taylor* v. *United States*, 495 U.S. 575, 581 (1990) (quoting H.R. Rep. No. 1073, 98th Cong., 2d Sess. 1, 3 (1984)). "Congress singled out burglary (as opposed to other frequently committed property crimes such as larceny and auto theft) for inclusion as a predicate offense * * * because of its inherent potential for

harm to persons. The fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate." *Id.* at 588; accord *id.* at 581 (burglary is "one of the 'most damaging crimes to society'") (quoting H.R. Rep. No. 1073, *supra*, at 3 (remarks of Sen. Specter)). In the 1984 enactment, Congress specifically defined the terms "burglary" and "robbery" to avoid "the possibility that culpable offenders might escape punishment on a technicality." *Id.* at 582 (quoting S. Rep. No. 190, 98th Cong., 1st Sess. 20 (1983)). The statute defined "[b]urglary" as a "felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." 18 U.S.C. App. 1202(c)(9) (1982 & Supp. II 1984).

In 1986, Congress expanded the category of predicate crimes subject to enhancement under ACCA to provide "a greater sweep and more effective use of this important statute." *Taylor*, 495 U.S. at 583 (quoting 132 Cong. Rec. 7697 (1986)). In the amendment, Congress provided enhanced penalties for firearm offenders with three previous convictions of a "serious drug offense" or a "violent felony." Pub. L. No. 99-570, §§ 1401-1402, 100 Stat. 3207-39 to 3207-40 (18 U.S.C. 924(e)). The definition of "violent felony" added by the 1986 amendment, which is still in force, defines the term "violent felony" to include any felony that

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that

presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). Unlike the 1984 statute, the amended statute did not define the term "burglary." The definition in the 1984 statute was omitted from the 1986 amendment, apparently inadvertently. *Taylor*, 495 U.S. at 589-590.

b. In response to confusion stemming from the deletion of the statutory definition, this Court in *Taylor* v. *United States* was "called upon to determine the meaning of the word 'burglary' as it is used in [ACCA]," 495 U.S. at 577. After reviewing the history and text of the statute at length, the Court held that the term connotes "the generic sense in which the term is now used in the criminal codes of most states." *Id.* at 598. The Court thus concluded that "any crime, regardless of its exact definition or label," is a "burglary" (and thus a "violent felony" under ACCA) if it "ha[s] the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599.

The Court then briefly discussed how to apply its conclusion to state statutes. 495 U.S. at 599-602. Looking to the text of ACCA and its legislative history, the Court adopted a "categorical" approach to determining whether a prior offense was a generic burglary. Under that approach, the Court said, sentencing courts "generally" should "look only to the fact of conviction and the statutory definition of the prior offense." *Id.* at 602. Thus, if a state statute precisely corresponds with the "generic" definition of burglary or is narrower, a conviction under it necessarily qualifies as "burglary" for purposes of ACCA. *Id.* at 599. The Court recognized, however, that some state statutes define burglary more broadly, to cover both conduct that constitutes generic burglary and conduct that does not. *Ibid.* Thus, the Court explained, a single burglary statute might proscribe both breaking into a building, which would constitute "generic" burglary, and breaking into a vehicle, which would not. *Id.* at 602. Under such circumstances, the Court stated, the categorical approach would "permit the sentencing court to go beyond the mere fact of conviction" and thus consider as a predicate offense a conviction for non-generic burglary if, "[f]or example," *ibid.*, "the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." *Ibid.*

2. On October 17, 1995, petitioner sold a Glock model 17 9mm pistol and ammunition to an undercover agent. Petitioner suggested that the agent should remove the serial number from the pistol because it was going to be reported as stolen. See 02-1216 Gov't C.A. Br. 3.

3. On March 3, 1999, petitioner pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). J.A. 68. The principal issue at sentencing was whether petitioner was subject to a 15-year minimum term of imprisonment under ACCA. The district court noted that, "[s]ince 1980, when he was 18 years old, [petitioner] has been on an 18-year crime spree," J.A. 51. Petitioner's criminal history, which includes several convictions for assault and battery and breaking and entering, see J.A. 195-216, is so extensive that his "criminal history score [under the Guidelines] is 39, three times the number triggering Category VI," J.A. 64, the highest available offender category. Relying on four of petitioner's convictions for breaking and entering, the government sought to establish that petitioner was an armed career criminal because he had

been convicted of generic burglary on at least three occasions.[1]

All of the convictions on which the government relied involved guilty pleas by petitioner to felony violations of one of two sections of Chapter 266 of the General Laws of the Commonwealth of Massachusetts (2002): Section 16, which prohibits breaking and entering a "building, ship, vessel or vehicle" in the nighttime with the intent to commit a felony, or Section 18, which prohibits breaking and entering a "building, ship or motor vehicle or vessel" in the daytime with intent to commit a felony. See Pet. Br. 9-10 n.3. The charging documents (criminal complaints) for each of the four convictions specified that petitioner "did break and enter" and possessed the "intent to commit a felony therein."[2] 3 J.A. 5, 15, 21; see also J.A. 204. But the complaints did not explicitly state that the offense involved a building; instead, they tracked the language of the statutes to say that petitioner had broken and entered a "building, ship, vessel or vehicle." 3 J.A. 5; see also 3 J.A. 15, 21; J.A. 173, 204. The government argued that two of the three elements of generic burglary—unprivileged entry and intent to commit a

[1] The government initially argued that the district court should also consider a fifth breaking and entering conviction, arising out of petitioner's April 1989 break-in at the Crispus Attucks Children's Center building. Because the government could not obtain the complaint application and police report for that conviction and had only the PSR's description of the incident, that conviction was not the focus of the government's arguments and will not be addressed further. See J.A. 175 n.2.

[2] For cases in Massachusetts district court, "the 'complaint' * * * is the final step in the charging process, roughly equivalent to a federal information." J.A. 174 (citing 1 Eric Blumenson et al., *Massachusetts Criminal Practice* §§ 4.1-4.2, at 51-59 (1998)).

crime—were established by petitioner's guilty plea to the charging document. J.A. 20-24.

The government further contended that the remaining element of generic burglary (that the conviction involved a building or structure) was demonstrated by examining the complaint applications and incorporated police reports for the four convictions. Under Massachusetts Criminal Procedure, as the court of appeals observed, the complaint is issued by a magistrate "based on a complaint application normally filed by a police officer and likely to incorporate or be accompanied by a police report. The application is customarily sworn and is automatically given to defendants at their arraignments." J.A. 174 (citation omitted) (citing, inter alia, Mass. Super. Ct. Standing Order 2-86; 1 Eric Blumenson et al., *Massachusetts Criminal Practice* §§ 4.2, 16.5(C) at 52, 416 (1998)). The complaints, complaint applications and police reports for the four offenses indicated the following:

> May 1989. The criminal complaint listed the "place of offense" as "30 Harlem St." and charged petitioner with "break[ing] and enter[ing] in the night time the building, ship, vessel or vehicle, the property of Jerri Cothran." 3 J.A. 5. The complaint application identified the victim as "Jerri Cothran 30 Harlem St.," and described the property "stolen [or] destroyed" as "Cellar Door." The complaint application's "other remarks" section stated "B[oston] P[olice] D[epartment] C[riminal] C[omplaint]# 91-394-783." 3 J.A. 6. The incorporated Boston Police incident report, denominated "complaint no. 91-394-783," gave the following recitation of events: "Responded to R.C. [radio call] to 30 Harlem St. for B&E in progress. On arrival observed cellar door in

rear had been broken down. Spoke to victim who stated that approx 3 a.m. she heard noises downstairs. She then observed [petitioner] in her pantry." 3 J.A. 7; see also J.A. 152 n.7.

March 1991. The criminal complaint charged petitioner with breaking and entering in the nighttime, "the building, ship, vessel or vehicle, the property of Fretters." J.A. 204. The police report stated that two managers at Fretter's (an appliance store) saw petitioner, who had been fired a month earlier, enter the rear stockroom door "holding a master key." 3 J.A. 11. Petitioner fled. A quick inventory revealed that four VCRs and three televisions were missing from the stock room. 3 J.A. 11-13; see also J.A. 152 n.7.

July 1991. The criminal complaint charged petitioner with breaking and entering "the building, ship or vessel of Monica Collins," and listed the "place of offense" as "258 Norwell St." 3 J.A. 15. The complaint application identified the victim as "Monica Collins 258 Norwell St." and listed the "[g]oods stolen" as "V.C.R." and "phone/ans. machine." The "other remarks" section said "see c[riminal] c[omplaint] # 11597345." The incorporated Boston Police incident report, denominated "complaint no. 11597345," stated the officers had responded to a radio call for a suspicious person "wearing red shorts and blue shirt in the hallway of 258 Norwell St." When police arrived, they saw petitioner dressed in red shorts and a blue shirt "walking away from above address * * * carrying a pink pillowcase" containing a VCR and a telephone answering machine. 3 J.A. 19. When police

went to Ms. Collins' apartment, they found that a panel on her "front door had been broken in exposing inside door lock. Officers entered Apt. and observed, in livingroom, areas where V.C.R. and phone [answering machine] were taken from. Officers also observed in bedroom one pink pillowcase missing from pillow." Messages retrieved from the answering machine were for Monica Collins. 3 J.A. 17, 19; see also J.A. 152 n.7.

February 1994. The criminal complaint listed the "place of offense" as "145 Gallivan Blvd." and charged petitioner with breaking and entering "the building, ship or motor vehicle or vessel of Russell McGaugh," and with maliciously destroying "the personal property, dwelling house, or building of Russell McGaugh." 3 J.A. 21. The complaint application listed the property "stolen [or] destroyed" as "[r]ear door," and the "other remarks" section stated "[r]ef to c[riminal] c[omplaint] # 41087022." 3 J.A. 22. A police report, denominated "complaint no. 41087022" stated that a neighbor saw petitioner go "to # 145 Gallivan and * * * observed [him] attempting to gain entry by turning several doorknobs." When police arrived they found petitioner at "the rear of the property * * * with both arms through the glass" of the "[r]ear [b]asement door." 3 J.A. 23-24.

Although petitioner did not contest the validity of the convictions, he argued that it was inconsistent with *Taylor*'s "categorical approach," J.A. 243, to look to police reports and complaint applications to determine whether a conviction involved a building and thus was a "generic burglary" covered by ACCA.

The district court acknowledged that petitioner had "hurtl[ed] from place to place, breaking into the first place he sees, breaking into—what was it, a child-care center at one point?," J.A. 34, but nevertheless concluded that the government had not established "three previous convictions" (18 U.S.C. 924(e)(1)) for generic burglary under ACCA. J.A. 46-66. The district court concluded that *Taylor* could be applied to cases involving guilty pleas, but held that complaint applications and police reports could not be considered under *Taylor* to determine the nature of the petitioner's prior convictions because they "contain[ed] allegations that were never adjudicated before a judge or jury, [and] never admitted by [petitioner]." J.A. 59. Instead, the court held that the prosecution must show "plea colloquies or plea agreements * * * to suggest that [petitioner] adopted one version of the facts rather than another." J.A. 60. Although the district court did not apply the ACCA enhancement, in recognition of the fact that petitioner's record "is about as bad as they come," J.A. 30, the court imposed a modest nine-month upward departure from the Guidelines sentence and sentenced petitioner to 46 months of imprisonment.

4. The government appealed, and the court of appeals vacated petitioner's sentence and remanded. J.A. 67-91. The court of appeals held that there is no "absolute bar" to the consideration of complaint applications and police reports when the sentencing court is trying to determine whether a defendant's "pleas of guilty constituted admissions to unlawful entries of buildings." J.A. 89. The court concluded that requiring proof through "a plea agreement or a plea transcript" would "make the use of prior convictions based on guilty pleas for purposes of the ACCA * * * enhancement hinge on the happenstance of state court record-keeping

practices." J.A. 85. To determine whether petitioner's "pleas of guilty constituted admissions to unlawful entries of buildings," J.A. 89, the court of appeals stated that courts should examine whether "the defendant and the government both believe[d] at the time [petitioner] entered his pleas 'that the generically violent crime . . . rather than the gener[ic]ally non-violent crime . . . was at issue.'" J.A. 88 (quoting *United States* v. *Harris*, 964 F.2d 1234, 1236 (1st Cir. 1992) (Breyer, C.J.)). The resolution of that inquiry, the court concluded, can be made on the basis of "sufficiently reliable evidence of the government and [petitioner's] shared belief that [petitioner] was pleading guilty to the unlawful entry of a building." J.A. 91.

5. On remand, the government introduced court records relating to two additional breaking and entering convictions that were listed in petitioner's PSR, both of which were obtained through guilty pleas. See J.A. 175, 195-196, 204. Those records indicated the following:

> February 1981. The criminal complaint charged that petitioner "did break and enter the gymnasium located in the Jamaica Plain High School * * * with the intent to steal and did steal therein athletic clothes." 3 J.A. 2. The complaint application recited the same information, but also described additional items petitioner had stolen. 3 J.A. 3.
>
> October 1990. The criminal complaint charged petitioner with breaking and entering "the building, ship, vessel or motor vehicle of Craig Milanesi," and listed the "place of offense" as "446 Shawmut Ave." 3 J.A. 8. The complaint application stated that petitioner was "observed at the rear of 446 Shawmut on the 2nd floor fire [e]scape[.] Window was fully open

apparently pried open by kitchen knife found on [petitioner]." 3 J.A. 9.

Petitioner submitted an affidavit (see J.A. 100-104) stating that the judges presiding at the four guilty pleas at issue at petitioner's original sentencing in this case had not read the police reports to him, and that petitioner did not admit the truth of the information contained in those incident reports as part of his plea proceedings. J.A. 100-102. He also stated that he had not made an admission in any court to the truth of "the facts set forth in the[] paragraphs" of the PSR relating to five of the six breaking and entering convictions identified by the government as ACCA predicate offenses. J.A. 102-104. Petitioner did not, however, say that he did not admit in state court to breaking and entering buildings in connection with those offenses, nor does his affidavit address the conviction stemming from the October 1990 break-in.

The district court reimposed its original sentence of 46 months of imprisonment. See J.A. 146-171. The district court held that the complaint applications and police reports the government had submitted were not reliable evidence of what offenses petitioner had pleaded guilty to in state court. J.A. 150. The court explained that the government had not refuted petitioner's claim, made in his affidavit, that the police reports underlying his convictions were not read to him in the plea proceedings and that he did not admit to the facts contained in the reports at his plea hearings. J.A. 171. Thus, the court was unable to "conclude by a fair preponderance of the evidence" that petitioner had pleaded guilty to entering buildings unlawfully. *Ibid.*

6. The government again appealed, and the court of appeals again vacated petitioner's sentence and remanded for resentencing. J.A. 172-184. The court held that the district court had "clearly err[ed]" by "find[ing] that [petitioner] did not plead guilty to at least three burglaries of buildings." J.A. 182. The court acknowledged that it is "barely possible" that on occasion, "someone in [petitioner's] position might have pled guilty, not to the charge that underlay the complaint (namely, burglary of a building), but to the burgling of some other venue such as a boat arguably not within the definition of generic burglary." *Ibid.* But the court considered it "nearly impossible" that "anything like it happened for most of [petitioner's] predicate pleas," or that the documents "were mistaken as to venue for four or more of the six crimes." *Ibid.* The court of appeals concluded that, under the circumstances of this case, "[a]bsent * * * evidence of peculiar circumstances, there is a compelling inference that the [guilty] plea was to the complaint and that the complaint embodied the events described in the [complaint] application or police report in the file." *Ibid.* The court noted that petitioner "ha[d] been given a full opportunity * * * to explain any circumstance surrounding the pleas that might defeat the natural inference that the pleas were to the crimes described" in the complaint applications and police reports, J.A. 181-182, but he had not done so, and instead merely said he had not "specifically admitted in open court" to the factual statement in the police reports "and that the underlying police reports were not read to him at the plea hearings." J.A. 182. The court therefore vacated petitioner's sentence and remanded the case with directions to impose the ACCA enhancement. J.A. 183-184.

SUMMARY OF ARGUMENT

When a defendant has pleaded guilty under a state statute that covers both generic and nongeneric burglary, the Armed Career Criminal Act permits district courts to consider complaint applications and incorporated police reports to determine whether the defendant has pleaded guilty to the burglary of a building (and thus to a violent felony). In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court said that a sentencing court may examine a charging document and jury instructions to determine whether the "jury was actually required to find all the elements of generic burglary," *id.* at 602, and every court of appeals with criminal jurisdiction has correctly concluded that a similar inquiry may be conducted to determine the nature of a defendant's guilty pleas. Examining complaint applications and incorporated police reports to determine whether the defendant pleaded guilty to the burglary of a building is consistent with *Taylor*'s purposes and general approach. The underlying purpose of the inquiry is the same as in *Taylor*: to determine the nature of the offense of which the defendant was convicted, rather than to determine what he actually did. And the inquiry that the sentencing court must undertake is comparable in scope to that endorsed by *Taylor*, involving only a limited examination of documents in the state case file.

In this case, two of the three elements of generic burglary ("unlawful or unprivileged entry" with "intent to commit a crime") were necessarily satisfied by petitioner's guilty pleas, because those are elements of the crimes of which petitioner was convicted, see Mass. Gen. Laws ch. 266, §§ 16, 18 (2002), and because the charging documents to which petitioner pleaded guilty

explicitly included those elements. Thus, this case involves only a narrow inquiry into whether the state-court records show that petitioner admitted the third element of generic burglary (that petitioner entered or remained in "a building or structure," rather than a ship or vehicle). That petitioner's conviction for his February 1981 break-in was for the burglary of a building is established by the charging document to which petitioner pleaded guilty, which itself specified that the incident involved breaking into a high-school gymnasium. 3 J.A. 2. Examining the complaint applications and police reports for petitioner's other convictions demonstrates that petitioner's other guilty pleas likewise constituted admissions to breaking and entering buildings.

In light of the presumption of regularity that attends guilty plea proceedings, see *Parke* v. *Raley*, 506 U.S. 20, 29-30 (1992), federal courts can presume compliance with the requirement that "a court may not convict unless there are sufficient facts on the record to establish each element of the offense." *Commonwealth* v. *DelVerde*, 496 N.E.2d 1357, 1363 (Mass. 1986). Here, that factual basis can plausibly have rested only on petitioner's entry of a building. In Massachusetts courts, the factual basis for a guilty plea is usually satisfied by reciting police reports, see 2 Eric Blumenson et al., *Massachusetts Criminal Practice* § 37.7B at 288 (1998). And there is nothing in the record to indicate that petitioner had pleaded guilty based on entering a ship or vehicle on any of the occasions at issue.

Examining complaint applications and incorporated police reports to determine the offense to which a defendant pleaded guilty is fully consistent with *Taylor*. The process at issue here does not require extensive factfinding. Rather, like the procedure specifi-

cally endorsed in *Taylor*, it requires only a narrow examination of state-court documents to determine whether the state court's guilt determination required a finding that the burglary involved a building. Nor does this method of proving the nature of prior burglary convictions pose inherent problems involving the reliability of evidence, because the inquiry is very narrow (whether there is any indication the offense could have involved breaking and entry of anything other than a building) and because the government retains the burden of persuasion at all times. The court of appeals did not shift the burden to petitioner in this case. It noted the commonsense inference that, given the overwhelming indications that petitioner's pleas were for entering a building, in the absence of evidence to the contrary, there was no realistic possibility that petitioner had pleaded guilty to burglary of anything else for four or more of his six prior burglary convictions.

The examination of state-court documents to identify the nature of a plea raises no serious constitutional doubts under this Court's precedents. *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), held that a defendant's prior conviction may constitutionally be treated as a sentencing factor to be found by the sentencing court by a preponderance of the evidence, and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), specifically declined to overrule that decision. Determining the nature of a conviction is not "factfinding" for *Apprendi* purposes, but rather a legal inquiry into what the record indicates about the nature of convictions. Even if that inquiry involves ancillary judicial determinations about whether a conviction is a qualifying predicate under a recidivist statute, every court of appeals that has considered the question has

correctly concluded that such questions are "sufficiently interwoven" with the fact of a prior conviction that "*Apprendi* does not require different factfinders and different burdens of proof" for them. *United States* v. *Santiago*, 268 F.3d 151, 157 (2d Cir. 2001), cert. denied, 535 U.S. 1070 (2002). Nor does the rule of lenity apply here because petitioner can identify no provision of ACCA that he contends is ambiguous, and *Taylor* has already construed ACCA to permit sentencing courts to consider charging instruments in order to determine whether a conviction under a nongeneric burglary statute was a conviction for generic burglary.

Finally, this Court should reject the invitation of amicus the National Association of Criminal Defense Lawyers (NACDL) to overrule *Almendarez-Torres*. That issue is neither "set out in the petition" nor "fairly included therein," Sup. Ct. R. 14.1(a), and petitioner raised no such claim either before the courts below or in his merits brief in this Court. In any event, the Court in *Apprendi* was correct in declining to disturb *Almendarez-Torres*.

ARGUMENT

THE ARMED CAREER CRIMINAL ACT PERMITS DISTRICT COURTS TO CONSIDER RELIABLE RECORD EVIDENCE SUCH AS COMPLAINT APPLICATIONS AND POLICE REPORTS IN DETERMINING WHETHER A DEFENDANT PLEADED GUILTY TO A BURGLARY OF A BUILDING AND THUS WAS CONVICTED OF A "VIOLENT FELONY"

In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court held that when a defendant had been convicted under a state statute that encompassed both generic and nongeneric burglary, a federal sentencing court determining whether the conviction was for a "violent

felony" under ACCA could look to "the charging paper and jury instructions" to see whether the jury was "required * * * to find all the elements of generic burglary in order to convict the defendant." *Id.* at 602. Although *Taylor* makes clear that federal district courts may look to state-court records to determine the nature of a jury conviction, petitioner contends that permitting district courts to look to complaint applications and incorporated police reports to determine whether a defendant has pleaded guilty to generic burglary violates *Taylor*'s categorical approach, impermissibly allowing "mini-retrials," Pet. Br. 18, and "wide-ranging inquiries into facts underlying a prior conviction," *id.* at 4, based on "stale evidence," *id.* at 27. At times, petitioner appears to suggest even that a conviction under a nongeneric burglary statute can be an ACCA predicate offense only if the offense is adjudicated by a jury. See *id.* at 5, 19, 20, 26; but see *id.* at 20.

Those contentions lack merit. *Taylor* and ACCA permit district courts to "consider other evidence" to determine the basis for a conviction. *Taylor*, 495 U.S. at 600. State court records may permit a federal district court to readily determine that a defendant's guilty pleas under statutes that cover both generic and nongeneric burglary "constituted admissions to unlawful entries into buildings." J.A. 89. And the documents that may be consulted for that purpose include certified copies of complaint applications and incorporated police reports that are part of the state court records. That approach is consistent with the sort of inquiry sentencing courts normally undertake in enhancing sentences for prior convictions, and that practice raises no serious constitutional doubt under this Court's precedents.

A. *Taylor* Permits Courts To Consider Complaint Applications And Incorporated Police Reports To Determine Whether A Guilty Plea Constituted An Admission To Burglary Of A Building

In *Taylor*, this Court briefly addressed how ACCA's categorical approach to classifying predicate offenses would be applied to convictions under different types of statutes. See 495 U.S. at 599-602. The Court specifically discussed the "example" of a conviction under a state burglary law that encompassed both "entry of an automobile" (*i.e.*, nongeneric burglary) "as well as [entry of] a building" (*i.e.*, generic burglary). *Id.* at 602. Under such circumstances, the Court held, a sentencing court validly could "consider other evidence" concerning the defendant's prior convictions. *Id.* at 600. The Court was careful to indicate that the relevant inquiry was not whether "the defendant actually committed a generic burglary," *id.* at 601, but only whether "the defendant had been convicted of" generic burglary. *Id.* at 600. The Court indicated that basing an enhancement on the sentencing court's own determination of the defendant's conduct would be inconsistent with ACCA's focus on the fact of conviction, *id.* at 600-601, would require "an elaborate factfinding process" that ACCA's legislative history had not discussed, *id.* at 601, and would result in "practical difficulties" of proof and "potential unfairness" in circumstances where, for example, a defendant pleaded guilty to a lesser offense but was later subject to an ACCA enhancement imposed "as if the defendant had pleaded guilty to burglary." *Id.* at 601-602. The Court concluded that an inquiry into the nature of the conviction, as opposed to the nature of the conduct, would not present those problems. Accordingly, the Court concluded that the "categorical approach" for classifying predicate

convictions under ACCA "permit[s] the sentencing court to go beyond the mere fact of conviction" where, "[f]or example," "the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." *Id.* at 602. As petitioner himself notes (Pet. Br. 21), *Taylor* prohibits only "an adjudication of facts anew, not a determination of whether those facts were adjudicated below."

1. Taylor Does Not Prohibit Sentencing Courts From Considering Guilty Pleas Under Nongeneric Burglary Statutes As ACCA Predicates

To the extent that petitioner contends that *Taylor* does not permit courts to consider guilty pleas under state burglary statutes that encompass both generic and nongeneric burglary as ACCA predicate offenses, he is mistaken. While *Taylor* itself speaks only of circumstances in which a state-court "jury was actually required to find all the elements of generic burglary" for a predicate offense, 495 U.S. at 602, that passage does not automatically disqualify from enhancement every guilty plea under a nongeneric burglary statute. The principal focus of the *Taylor* opinion (and, indeed, the only subject the government briefed, see 88-7194 U.S. Br. at 11-37) was whether "the word 'burglary' as it is used in [ACCA]," 495 U.S. at 577, meant common-law burglary or modern generic burglary. The Court addressed the application of its definition only briefly at the end of its opinion. *Id.* at 599-602. As then-Chief Judge Breyer observed, *Taylor* is best read as setting forth "an example * * * of *one way* in which a trial court, faced with a past conviction for violating a single statute that covers more than one crime, might decide *which* of those crimes the prior conviction involved."

United States v. *Harris*, 964 F.2d 1234, 1236 (1st Cir. 1992). Particularly since the vast majority of convictions under nongeneric burglary statutes result from guilty pleas rather than jury trials, "[i]t seems unlikely that the Members of Congress, immersed in the intensely practical concerns of controlling violent crime, would have decided" (*Taylor*, 495 U.S. at 593-594) to exclude all plea-based convictions as predicate offenses. Thus, *Taylor* "d[oes] not mean that one who pleads guilty to what would otherwise constitute a 'violent felony' is somehow, for future sentence-enhancement purposes, home free." *Harris*, 964 F.2d at 1236. As the court of appeals noted below, "[a]ll twelve circuits that have addressed the issue have agreed that *Taylor* analysis applies after a guilty plea." J.A. 178 n.4 (collecting authorities).[3]

***2. Examining The Complaint Application And Incorporated Police Report To Determine Whether The Guilty Plea Is An Admission To Unlawful Entry Of A Building Is Consistent With* Taylor**

Examining the complaint application and incorporated police report to determine whether the defendant pleaded guilty to the burglary of a building accords with *Taylor*'s purposes and general approach. The underlying purpose of the inquiry is the same as in

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[3] See, *e.g.*, *United States* v. *Adams*, 91 F.3d 114, 116 (11th Cir.) (collecting decisions from First, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits), cert. denied, 519 U.S. 1047 (1996); *United States* v. *Hernandez*, 218 F.3d 272, 278 (3d Cir. 2000); *United States* v. *Cook*, 26 F.3d 507, 509 & n.5 (4th Cir.), cert. denied, 513 U.S. 953 (1994); *United States* v. *Hill*, 131 F.3d 1056, 1063-1064 (D.C. Cir. 1997) (applying *Taylor* analysis to guilty pleas under Sentencing Guidelines' career offender provision, which employed parallel language); *United States* v. *Palmer*, 68 F.3d 52, 59 (2d Cir. 1995) (same).

examining the charging paper and jury instructions (which the Court endorsed in *Taylor*): to determine the nature of the offense of which petitioner was convicted, rather than to determine what he actually did. Contrary to petitioner's repeated claims, *e.g.*, Pet. Br. 21, 22, 23, the complaint application and police reports are not reviewed "to determine whether the defendant actually committed generic burglary." *Id.* at 20. The court looks to the state-court records "*not* because the court may properly be interested * * * in the violent or non-violent nature of that particular conduct," but because that information "may indicate that * * * the generically violent crime ('building'), rather than the generically non-violent crime ('vehicle') was at issue" in the plea. *Harris*, 964 F.2d at 1236. In addition, the inquiry that the sentencing court undertakes is no broader than that endorsed by *Taylor*. In both instances, the sentencing court examines documents in the case file (there, the charging papers and jury instructions, see 495 U.S. at 602, here, the complaint application and incorporated police report). And in both instances, the court is engaging in logically parallel inquiries: in *Taylor*, whether the finder of fact could have adjudicated guilt only if it "had to find an entry of a building to convict," *ibid.*, and, here, in the context of guilty pleas, whether the defendant's "pleas of guilty constituted admissions to unlawful entries into buildings," J.A. 89. This approach is also consistent with the language of ACCA itself, with its emphasis on the fact of conviction rather than the underlying conduct, *Taylor*, 495 U.S. at 600, and its emphasis on "the elements of the statute of conviction." *Id.* at 600-601.

Petitioner's case illustrates how complaint applications and incorporated police reports can support the conclusion that a defendant pleaded guilty to each of

the elements of generic burglary. Two of the three elements of generic burglary—that petitioner made an "unlawful or unprivileged entry" with "intent to commit a crime," *Taylor*, 495 U.S. at 599—necessarily were satisfied by petitioner's guilty pleas. Those elements are necessary for any conviction under the relevant statutes, see Mass. Gen. Laws ch. 266, §§ 16, 18 (2002), and the charging instruments to which petitioner pleaded guilty explicitly charged those elements. See 3 J.A. 2, 5, 8, 15, 21. By entering a guilty plea, petitioner made an "admission that he committed the crime charged against him." *United States* v. *Broce*, 488 U.S. 563, 570 (1989) (quoting *North Carolina* v. *Alford*, 400 U.S. 25, 32 (1970)); accord *Commonwealth* v. *Rabb*, 725 N.E.2d 1036, 1044 (Mass. 2000) (holding that although tape recording of proceedings was no longer available, "the fact that the * * * judge accepted the defendant's pleas makes it certain that the defendant admitted under oath facts that proved" the offense); *Porter* v. *Superintendant*, 417 N.E.2d 1199, 1203 (Mass. 1981) ("By pleading guilty to a crime * * * , [the defendant] can be presumed to have admitted sufficient facts to establish * * * that crime.").

The third element of generic burglary is that the defendant entered or remained in "a building or structure." *Taylor*, 495 U.S. at 599. For one of petitioner's prior offenses, that fact is established by examining only the charging instrument to which petitioner pleaded guilty. The complaint for petitioner's February 1981 offense, to which petitioner pleaded guilty, charges *only* that petitioner "did break and enter the gymnasium located in the Jamaica Plain High School." 3 J.A. 2. Thus, the only remaining question, to decide whether petitioner had two other qualifying predicate offenses, is whether his other guilty pleas to breaking

and entering were for entry of a building, as opposed to a ship, vessel, or vehicle. The complaint applications and incorporated police reports, considered in light of the role of a Massachusetts judge at a guilty plea, shed crucial light on that issue.

In taking a guilty plea, "a court may not convict unless there are sufficient facts on the record to establish *each element of the offense.*" *Commonwealth* v. *DelVerde*, 496 N.E.2d 1357, 1363 (Mass. 1986) (emphasis added); accord *Commonwealth* v. *Jones*, 799 N.E.2d 601, 602 n.2 (Mass. App. Ct. 2003) (the judge "must * * * ensure that a factual basis exists for each element of the offenses charged") (citing *DelVerde*). See generally Mass. R. Crim. P. 12(c)(5)(A) ("A judge shall not accept a plea of guilty unless he is satisfied that there is a factual basis for the charge."). The records of petitioner's guilty pleas indicate that petitioner "[a]dmit[ted] suff[icient] facts" to support the plea. See 3 J.A. 10, 14, 20; see also 3 J.A. 4 (notes finding of "Guilty" with the notation "SF" for "sufficient facts"). In light of the presumption of regularity that attends guilty plea proceedings, see *Parke* v. *Raley*, 506 U.S. 20, 29-30 (1992), federal courts can presume compliance with the factual basis requirement of petitioner's pleas. And that factual basis can only have plausibly rested on petitioner's entry of a building.[4]

[4] For the first time in any court, petitioner contends (Pet. Br. 23; see also *id.* at 32) that permitting a federal sentencing court to inquire into the nature of a prior conviction "creates a severe due process problem." Although it is unclear precisely what argument petitioner is making, it appears that he contends that he did not have actual notice *at the time of the state plea* that he was pleading guilty to burglary of a building. Petitioner also contends (*id.* at 23) that "he was never charged with" burglary of a building. Those arguments are not properly before the Court, see *United States* v. *Bean*, 537 U.S. 71, 74 n.2 (2002); *TRW Inc.* v. *Andrews*, 534 U.S. 19, 34 (2001), and in any event are without merit. Petitioner had ample notice of the nature of the charge against him in light of the fact that he was arrested for burglary of a building, the Commonwealth sought to obtain a complaint based on that offense, and burglary of a building was undeniably encompassed in each of the criminal complaints to which he pleaded guilty. See generally *Commonwealth* v. *Brown*, 748 N.E.2d 972, 982 (Mass. App. Ct. 2001) (rejecting due process notice claim in part because "information contained in * * * *the police report* enabled the defendant to understand the charge against him and to prepare his defense") (emphasis added).

Several factors give rise to the strong inference that, absent evidence to the contrary, petitioner's guilty pleas constituted admissions to breaking and entering a building. In Massachusetts state courts, "demonstrat-[ing] a factual basis for the plea * * * [u]sually * * * is accomplished by the recitation of either the grand jury minutes or police reports, but defendant's admissions during the plea * * * can also support the factual basis." 2 Eric Blumenson et al., *Massachusetts Criminal Practice* § 37.7B at 288 (1998). In addition, as the defendant, petitioner presumptively was aware of the allegations contained in complaint applications and police reports.[5] See J.A. 174 ("Courts in Massachusetts

[5] Petitioner contends that it was improper for the First Circuit to rely on its "understanding of the complaint and discovery procedures followed" under Massachusetts law in reaching its conclusion, claiming that courts can draw inferences from the requirements of state law only if their understanding of the law is "derived from evidence in the record." Pet. Br. 24; see also *id.* at 33-34 n.15, 36. Petitioner took the opposite position in the court of appeals, where he cited Massachusetts law to support his claim that the complaint application and police report were not part of the complaint and thus could not serve to clarify it. 02-1216 Pet. C.A. Br. 38. In any event, that claim is mistaken. Courts of appeals are presumed to be knowledgeable about the law of the

can presume that defendants know the information contained in police reports."); see Mass. Super. Ct. Standing Order 2-86 (requiring prosecutor to provide "copies of all police reports" to defendant at arraignment); see also Mass. Dist./Mun. Ct. R. Crim. P. 3 (effective 1996) ("At or before arraignment, the court shall ensure * * * that a copy of the police [report] * * * is provided to the defense."). There is nothing in the record to indicate that petitioner entered a ship or vehicle; indeed, the "vehicle" section on each of the police reports is either blank or affirmatively indicates

states over which they have jurisdiction. Because of that, this Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988), because those courts "are better schooled in and more able to interpret the laws of their respective States." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985). The cases petitioner cites (Pet. Br. 24) are not to the contrary. *United States* v. *DiPina*, 178 F.3d 68 (1st Cir. 1999), involved an unspecified juvenile proceeding in family court and records did not indicate whether it was a guilty plea or a plea of nolo contendere; the court of appeals specifically noted that the fact that the case involved a juvenile made admissions during the proceeding especially unreliable. *Id.* at 73-74 & n.8. Under those peculiar circumstances, the court remanded for a determination of what process was followed. *Id.* at 77. *United States* v. *Roberts*, 39 F.3d 10 (1st Cir. 1994), involved a charge of driving under the influence which had been "continued by the state court *without a finding* [of guilt]." *Id.* at 10 (emphasis added). The court remanded for further clarification of the procedures that were followed, stating that under the two-stage state court procedures then in effect (but since abolished), the lack of finality at the first stage *might* make the defendant's admission "unreliable as an admission of guilt." *Id.* at 12. The court noted that a comparable admission at the second stage would have been a binding admission of guilt. *Ibid.* None of those procedural complications is present here.

that the section is not applicable ("N/A"). See 3 J.A. 7, 11, 19, 23. Accordingly, there would have been no basis in the record for the state court to find sufficient facts to support a guilty plea to entering a ship or vehicle. Finally, the forms noting petitioner's guilty pleas for three of his convictions identify the "place of offense" with *the same street address* set forth in the complaint application and police reports, clearly tying the offense of conviction to the events described in those documents.[6] As the court of appeals correctly concluded, those facts give rise to "a compelling inference that the plea was to the complaint and that the complaint embodied the events described in the [complaint] application" and the incorporated police report. J.A. 182. Thus, a review of the court documents indicates that the state court was "required to find all the elements of generic burglary."[7] *Taylor*, 495 U.S. at 602.

As the court of appeals concluded, an absolute bar on considering complaint applications and incorporated

[6] See 3 J.A. 14 (July 1991 break-in at "258 Norwell St."); 3 J.A. 20 (February 1994 break-in at "145 Gallivan Blvd."); see also 3 J.A. 4 (May 1989 break-in at "30 Harlem St.").

[7] Petitioner errs in stating (Pet. Br. 26) that "the prosecutor conceded [that] the issue of whether petitioner had burglarized a building as opposed to some other enclosure was not 'necessarily adjudicated' in his prior plea proceedings." That assertion apparently refers to the government attorney's statement (quoted at *id.* at 25) that "I have no indication of what the plea colloquy determined or what documents were cited at the plea colloquy." J.A. 133. That statement was made in response to the district court's question about whether the police reports were specifically referenced "during the plea colloquy." *Ibid.* The prosecutor clearly argued that the district court "can, in fact, make a determination as to what elements of the statute the defendant entered [his] plea to by looking at" the complaint applications and police reports. J.A. 114; see also J.A. 110, 112.

police reports "would make the use of prior convictions based on guilty pleas * * * hinge on the happenstance of state court record-keeping practices. The enhancement would only apply when a plea agreement or a plea transcript had been preserved that showed a defendant pled guilty to a violent felony." J.A. 85. Limiting the permitted inquiry to plea colloquies and written plea agreements, as the district court did, would frequently make it impossible for the government to pursue enhancements against even the worst offenders, as this case demonstrates. See J.A. 176 (petitioner is "just the kind of burglar whom Congress had in mind in adopting [ACCA]"); J.A. 80 ("[petitioner]'s record is about as bad as they come"). Such a rule would have a particularly grave effect in Massachusetts, where recordings of plea colloquies are routinely destroyed after only a brief retention period.[8] See generally Mass. Special R. of Dist. Ct. 211(A)(4) (requiring retention of recordings of guilty pleas for two and a half years).[9]

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[8] See, *e.g.*, *Commonwealth* v. *Lopez*, 690 N.E.2d 809, 811 & n.3 (Mass. 1998); *Commonwealth* v. *Grant*, 689 N.E.2d 1336, 1338 (Mass. 1998); see also *Raab*, 725 N.E.2d at 1044; *Commonwealth* v. *Gabin*, No. 12069, 2001 WL 1566172, at *3 (Mass. Super. Ct. Dec. 7, 2001).

[9] Numerous courts of appeals have agreed that in considering ACCA or other recidivist enhancements, it is appropriate to consult court records to determine the nature of offenses to which the defendant pleaded guilty. See *United States* v. *Hernandez*, 218 F.3d 272, 279 (3d Cir. 2000) (allowing consideration of "easily produced court documents"); *United States* v. *Coleman*, 158 F.3d 199, 202-203 (4th Cir. 1998) (en banc) (allowing consideration of the "statement of charges" filed by the complaining witness); *United States* v. *Hill*, 131 F.3d 1056, 1063 (D.C. Cir. 1997) (allowing consideration of "various court documents"); *United States* v. *Palmer*, 68 F.3d 52, 59 (2d Cir. 1995) (allowing consideration of "easily produced and evaluated court documents"); see also *United States* v. *Richardson*, 230 F.3d 1297, 1300 (11th Cir. 2000) (per curiam) (permitting district court to examine police reports to determine whether ACCA predicate crimes were "committed on 'occasions different from one another'"), cert. denied, 532 U.S. 983 (2001); *United States* v. *Hudspeth*, 42 F.3d 1015, 1018 n.3 (7th Cir. 1994) (en banc) (same), cert. denied, 515 U.S. 1105 (1995). But see, *e.g.*, *United States* v. *Payton*, 918 F.2d 54, 56 (8th Cir. 1990) (holding that district court erred by looking "beyond the statute, the charging paper and the jury instruction"). The cases cited by amicus (NACDL Br. 24-25), actually support the government's position. *Palmer* relied heavily on amendments to the Sentencing Guidelines that are not implicated here to determine that the district court could not rely on the PSR in determining career offender status under the Guidelines, 68 F.3d at 57, and explicitly stated that courts *could* rely on court documents for the same inquiry. *United States* v. *Demint*, 74 F.3d 876 (8th Cir.), cert. denied, 519 U.S. 951 (1996), looked to state law to clarify whether a charging document alleging "burglary of a camp" involved a "structure" under state law. *Id.* at 877. In *United States* v. *Howze*, 343 F.3d 919, 923 (7th Cir. 2003), the court of appeals looked to unspecified "charging papers" to determine that although the statute of conviction encompassed nonviolent conduct, the defendant was convicted of a form of the offense that presented a risk of violence.

3. Considering Court Documents To Determine If Guilty Pleas Constitute Admissions To Unlawful Entry Of Buildings Does Not Create The Problems Taylor *Sought To Avoid*

Petitioner contends (Pet. Br. 26-27) that *Taylor*'s categorical approach to classifying predicate offenses prohibits district courts from examining complaint applications and incorporated police reports to determine the offense to which a defendant pleaded guilty, and that such an examination creates the "problems [*Taylor*] sought to avoid," *id.* at 26. That is incorrect. The sort of factfinding procedure that *Taylor* found problematic was a de novo determination of whether

"the defendant actually committed a generic burglary." 495 U.S. at 601. That sort of inquiry would involve a review of the actual testimony at trial (or live witnesses presenting the same testimony), which would pose both "practical difficulties" and create "potential unfairness" to defendants who had pleaded guilty to reduced charges only to find themselves again defending against burglary allegations. *Id.* at 601-602. The court of appeals took pains to emphasize that the inquiry at issue here was designed to avoid "enmesh[ing] the district court in the kind of factually disputed 'archeological dig' about the defendant's conduct that *Taylor* guards against, with all the attendant practical difficulties of holding mini-trials on a defendant's prior convictions." J.A. 88. The process at issue here, like that specifically endorsed in *Taylor*, requires only a narrow examination of state-court documents to determine whether the state court's guilt determination required a finding that the burglary involved a building. And looking to court documents to determine the nature of a prior conviction is consistent with the language of ACCA, because (like the inquiry in *Taylor*), it focuses on the elements supporting conviction and the fact of conviction rather than on "the facts underlying the prior convictions." 495 U.S. at 600.

If the court documents indicate that a plea was to generic burglary, ordinarily the only other evidence the district court might receive would be any "countervailing evidence [offered by the defendant] to defeat the inference" that the defendant pleaded guilty to generic burglary. J.A. 182. Typically, as here, the defendant would submit an affidavit. That method of inquiry suffers no more from the "problems associated with old, stale evidence," Pet. Br. 27, than does *Taylor*, which itself contemplates making a determination about

the nature of the offense from looking to documents from the case file of the same vintage, *i.e.*, "the charging paper and jury instructions." 495 U.S. at 602. Contrary to petitioner's repeated claims (Pet. Br. 21, 27, see also NACDL Br. 27-28), this method of proving the nature of prior burglary convictions does not pose inherent problems involving the reliability of evidence, both because of the narrow scope of the inquiry, and because the burden of persuasion at all times rests on the government.

The complaint application and incorporated police report are relevant primarily not as an assertion of the truth of all the facts set forth within them, but because they embody the charges the state was pursuing against the defendant. As the *Harris* court put it, they indicate that "the government * * * believed that the generically violent crime ('building') * * * was at issue," 964 F.2d at 1236. In addition, to be relevant to the determination of whether the crime involved a guilty plea to entering a building, the documents need be reliable only on the issue of whether the incident could have involved breaking and entry of anything other than a building. Cf. *United States* v. *Delgado*, 288 F.3d 49, 56 (1st Cir.) ("the police report 'may not be entirely reliable in all of its aspects,' but 'is entirely reliable' as to 'where the crime was committed'") (quoting district court opinion), cert. denied, 537 U.S. 1062 (2002); cf. generally *Commonwealth* v. *Durling*, 551 N.E.2d 1193, 1200-1201 (Mass. 1990) (noting that state law makes it a crime to file a false police report and noting "the inherent reliability" of police reports). If complaint applications and police reports are ambiguous about whether a vehicle or ship could possibly have been the site of the break-in, they are insufficient to support an enhancement. Nothing in the court of

appeals' opinions suggests that an ambiguous complaint application and police report (that, for example, is unclear about whether a burglary involved a house or rather might have involved a car or boat in the driveway) would be sufficient to support a finding that the conviction was for generic burglary.

4. The Court Of Appeals' Test Does Not Reverse The Burden Of Proof For Demonstrating The Applicability Of ACCA Enhancements

Petitioner contends (Pet. Br. 24-26; see also NACDL Br. 27-28) that the test adopted by the court of appeals impermissibly reverses the ordinary burden of proof and shifts the burden to the defendant to show that the enhancement does not apply. To the contrary, the court of appeals explicitly stated that the government "bears the burden of proving" (J.A. 89 (quoting *United States* v. *Dueno*, 171 F.3d 3, 7 (1st Cir. 1999))) by a preponderance of the evidence that a defendant's "pleas of guilty constituted admissions to unlawful entries into buildings." *Ibid.* The court did not indicate that a presumption would arise that the defendant pleaded guilty to generic burglary from the mere fact that he was arrested for that offense, or the fact that police sought a complaint for that offense.

During the first appeal, the court of appeals set forth an illustrative set of questions the district court could consider in making the determination of whether a complaint application and police report would give rise to such an inference. See J.A. 86. During the second appeal, the court of appeals recognized it was "possible" (though "barely" so (J.A. 182)) that for any one of petitioner's predicate offenses, petitioner "might have pled guilty, not to the charge that underlay the complaint (namely, burglary of a building), but to the

burgling of some other venue such as a boat arguably not within the definition of generic burglary." J.A. 182. Those statements do not indicate, as petitioner claims (Pet. 24), that the court of appeals approved an automatic presumption in every case that a guilty plea necessarily embodies the facts of the police report of a defendant's arrest, which a defendant must rebut to avoid imposition of the enhancement. The court indicated that a "compelling inference" (J.A. 182) arose in this case only because of the overwhelming evidence that the government had produced indicating that petitioner had pleaded guilty in five cases in which the complaint application and incorporated police report clearly indicated that the offense involved burglary of a building (with no reference whatever to ships or vehicles), coupled with a *sixth* guilty plea to a complaint charging *only* generic burglary. While the court recognized that petitioner "[c]onceivably" might have pleaded guilty to a different offense on *one* occasion, the court concluded it was "nearly impossible" that "for four or more of the six crimes," petitioner would have pleaded guilty to a different type of burglary than that for which he had been arrested. J.A. 182. That commonsense observation did not amount to any misapplication of the burden of persuasion. To the contrary, it was only in the face of the evidence adduced by the government that the court concluded that petitioner's predicate convictions had satisfied the requirements of ACCA, in the absence of any "countervailing evidence to defeat the inference" that he had pleaded guilty to generic burglary. *Ibid.*

The court of appeals did not place exorbitant demands on petitioner. For example, petitioner could have filed an affidavit in which he swore that on the occasions in question, he had pleaded guilty to the

burglary of a ship or vehicle nowhere mentioned in the complaint application or police report. See J.A. 117 (prosecutor states that it would have been sufficient for petitioner to state that "[a]t the time of my plea I told them it was not a building, it was a car," or even "I contested it in some way"). If the district court reasonably credited that affidavit, ACCA would not have applied. Petitioner, however, simply said that he had not at the time of the pleas "admit[ted] the truth of the information *contained in the [police] report[s].*" J.A. 100 (emphasis added); see also J.A. 182. Because there was "no * * * evidence" (J.A. 182) to rebut the inference that petitioner had pleaded guilty to generic burglary, the court of appeals correctly concluded that petitioner's convictions satisfied the requirements of ACCA.[10]

B. The Doctrine Of Constitutional Doubt Does Not Require Adoption Of Petitioner's Construction

Relying on *Jones* v. *United States*, 526 U.S. 227 (1999), petitioner argues (Pet. Br. 29-35), for the first time in any court, that the doctrine of "constitutional doubt" requires this Court to construe ACCA not to

[10] Indeed, the court of appeals gave an unduly generous interpretation to petitioner's affidavit, saying that in it, petitioner said that "he had not specifically admitted in open court to breaking into houses and that the underlying police reports were not read to him at the plea hearings." J.A. 182. In fact, petitioner stated only that the judges presiding at his plea proceedings had not read the police report to him, "did not ask him whether or not the information contained in the [police] report was true," and that he "did not admit the truth of the information contained in the [police] report as part of my plea." J.A. 100. But stating that he did not confirm the accuracy of the *entire police report* in open court is a far cry from saying that he did not admit to breaking and entering a building.

permit inquiry into the nature of a conviction obtained by guilty plea. Petitioner contends that judicial determinations about the nature of a defendant's prior offenses raises "grave and doubtful" (Pet. Br. 35) constitutional questions in light of this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), in which the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Petitioner contends that the doctrine of constitutional doubt requires the court to construe ACCA in his favor to avoid addressing the question whether Congress may constitutionally draft a criminal statute that predicates an enhanced penalty on a judicial determination of the nature of a defendant's prior convictions. Petitioner has not, however, raised a claim in this Court that judicial determination of the nature of his prior convictions would actually be unconstitutional. Nor did he raise such a claim before the court of appeals or in his certiorari petition. Therefore, any such claim "is not properly before" this Court. *Delta Airlines, Inc.* v. *August*, 450 U.S. 346, 362 (1981).

The doctrine of constitutional doubt does not assist petitioner. That doctrine applies only if a statute is "genuinely susceptible to two constructions after * * * its complexities are unraveled" using other interpretive tools, and one resolution of the ambiguity would raise a serious constitutional question. *Almendarez-Torres* v. *United States*, 523 U.S. 224, 238 (1998). There is no grave doubt under current law (or the law at the time ACCA was enacted) about the constitutionality of having a judge determine the nature of a prior conviction. In *Almendarez-Torres*, this Court held that a defendant's prior conviction may constitutionally be

treated as a sentencing factor to be found by the sentencing court by a preponderance of the evidence, rather than an element of the offense to be found by the jury beyond a reasonable doubt, even when the court's finding serves to increase the defendant's sentence beyond the otherwise-applicable statutory maximum. See 523 U.S. at 239-247; see also *id.* at 243-244 (noting long tradition of judges using prior convictions as sentencing factors). Indeed, *Almendarez-Torres* cited ACCA as an example illustrating that "prior commission of a serious crime * * * is as typical a sentencing factor as one might imagine." *Id.* at 230.

Although the Court in *Apprendi* found it to be "arguable that *Almendarez-Torres* was incorrectly decided," 530 U.S. at 489, it specifically declined to overrule that decision. *Id.* at 487-490; see *id.* at 490. Just last Term, this Court noted that "[w]e have not extended [*In re*] *Winship's* protections to proof of prior convictions used to support recidivist enhancements." *Dretke* v. *Haley*, 124 S. Ct. 1847, 1853 (2004) (citing, inter alia, *Almendarez-Torres*); see also *Blakely* v. *Washington*, 124 S. Ct. 2531, 2536 (2004) (restating *Apprendi* rule that exempts "the fact of a prior conviction"). In the face of those decisions, it is not surprising that petitioner does not even cite *Almendarez-Torres*, much less challenge its continuing validity. In any event, this Court does not employ the canon of constitutional avoidance to revisit one of its binding precedents. See *Harris* v. *United States*, 536 U.S. 545, 555-556 (2002). The canon instead provides a tool for statutory construction that "rests upon our respect for Congress, which we assume legislates in the light of constitutional limitations.'" *Id.* at 556 (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991)). The canon has no role to play when this Court's decisions and the law at

the time Congress acted demonstrate the absence of constitutional doubts. *Ibid.* The constitutional avoidance canon accordingly provides no reason to construe ACCA to prohibit district courts from examining state court records to determine the nature of a prior conviction.

Petitioner suggests (Pet. Br. 32) that the approach taken by the court of appeals "would *require* the sentencing court to find facts beyond those adjudicated in the prior guilty plea in order to determine whether that plea was for a generic burglary." Here, he contends, the court of appeals made "findings of fact * * * regarding the underlying conduct and the plea proceedings, as well as findings concerning Massachusetts state court procedures." Pet. Br. 34. Having a district court find such facts, petitioner claims, would implicate *Apprendi*. *Id.* at 34-35. That claim is without merit.

As explained above, see pp. 22-23, *supra*, determining the nature of a prior conviction involves only an assessment of what the state court itself already has been "required to find," *Taylor*, 495 U.S. at 602, in order to find the defendant guilty of the crime charged. As with the inquiry specifically condoned by *Taylor* into the charging document and jury instructions, it is a largely legal assessment of the effect of documents in the court file, and of whether, given those documents, the factfinder was "required to find" the defendant committed burglary of a structure to convict. Examination of the meaning of the court files is not "factfinding" for *Apprendi* purposes, but rather a legal inquiry into what the record indicates about the nature of convictions. Thus, because an inquiry into the nature of a guilty plea is the "same determination" involved in

Taylor, *Harris*, 964 F.2d at 1236, petitioner's constitutional doubt argument fails.[11]

Even if petitioner were correct that determining the crime to which a defendant has pleaded guilty requires ancillary judicial determinations about the nature of prior convictions, it would not raise "[g]rave and doubtful questions" (Pet. Br. 34) about the validity of the practice under current law. *Taylor* itself authorized courts to undertake a comparable inquiry to classify prior convictions, which even petitioner concedes is not properly considered *Apprendi* "factfinding." See Pet. Br. 33. Every court of appeals that has considered the question has held that "*Apprendi* * * * leav[es] to the judge, consistent with due process, the task of finding not only the mere fact of previous convictions but other related issues as well" relating to prior convictions. *United States* v. *Santiago*, 268 F.3d 151, 156 (2d Cir. 2001), cert. denied, 535 U.S. 1070 (2002). Thus, courts have unanimously concluded that *Apprendi* and *Almendarez-Torres* permit not only a narrow inquiry into "the fact that a prior conviction exists, but also a determination of whether a conviction is one of the enumerated types qualifying for the sentence enhancement" even if it requires "the finding of facts beyond the mere fact of conviction." *United States* v. *Kempis-Bonola*, 287 F.3d 699, 703 (8th Cir.) (determination whether a prior conviction is "aggravated" felony under

[11] Petitioner errs in suggesting (Pet. Br. 29) that the *Taylor* opinion itself expressed constitutional doubt about having the sentencing court determine the nature of the prior conviction. In passing, *Taylor* raised a question about the distinct issue of the sentencing court "conclud[ing], from its own review of the record, that the defendant actually committed a generic burglary." 495 U.S. at 601. As explained above, see pp. 22-23, *supra*, that issue is not presented here.

8 U.S.C. 1326) (internal quotation omitted), cert. denied, 537 U.S. 914 (2002). The courts of appeals likewise uniformly have held that *Apprendi* permits judicial determination of whether offenses qualify as predicate offenses under ACCA[12] and the federal three-strikes statute,[13] and whether offenses are "aggravated" felonies under 8 U.S.C. 1326(b)(2).[14] And every court of appeals that has considered the question has concluded that judges may validly determine whether ACCA predicate offenses were "committed on occasions different from one another," although the inquiry requires consideration of "the nature of the crimes, the identities of the victims, * * * the locations, and * * * whether the crime involved distinct criminal aggressions." *United States* v. *Morris*, 293 F.3d 1010, 1013 (7th Cir.), cert. denied, 537 U.S. 987 (2002); accord *United States* v. *Stone*, 306 F.3d 241, 243-244 (5th Cir. 2002); *Santiago*, 268 F.3d at 155. The cases cited by petitioner (Pet. Br. 32) are not to the contrary.[15]

[12] *United States* v. *Campbell*, 270 F.3d 702, 708 (8th Cir. 2001) (rejecting claim that *Apprendi* applies to determination of predicate offenses under ACCA because application requires "a 'complex series of factual findings' to determine whether or not prior offenses constitute violent felonies or serious drug offenses"), cert. denied, 535 U.S. 946 (2002).

[13] *United States* v. *Gatewood*, 230 F.3d 186, 191-192 (6th Cir. 2000), cert. denied, 534 U.S. 1107 (2002).

[14] See, *e.g.*, *Kempis-Bonola*, 287 F.3d at 703; *United States* v. *Martinez-Garcia*, 268 F.3d 460, 463-465 (7th Cir. 2001), cert. denied, 534 U.S. 1149 (2002).

[15] Petitioner cites (Pet. Br. 32) both *United States* v. *Cooper*, 375 F.3d 1041 (10th Cir. 2004), and *United States* v. *Sanders*, 377 F.3d 845 (8th Cir. 2004), for the proposition that "[l]imiting *Taylor*'s reach to the fact of conviction as determined by categorical approach cabins § 924(e) within the confines of the *Apprendi-Blakely* exception." Both cases merely restate the proposition that the

The courts of appeals have correctly concluded that inquiry into the fact of a prior conviction under *Apprendi* and *Almendarez-Torres* extends to ancillary determinations about whether a conviction is a qualifying predicate under the statute. As this Court has noted, recidivism has long been considered a distinct issue because "recidivism 'does not relate to the commission of the offense, *but goes to the punishment only*.'" *Almendarez-Torres*, 523 U.S. at 244 (quoting *Graham* v. *West Virginia*, 224 U.S. 616, 629 (1912)); see also *Nichols* v. *United States*, 511 U.S. 738, 747-748 (1994). For the same reasons that this Court has properly held that recidivism is a sentencing factor that may be determined by a sentencing judge, see pp. 44-45, *infra*, any ancillary determinations about whether a prior conviction is properly classified as an ACCA predicate are "sufficiently interwoven" with the fact of a prior conviction that "*Apprendi* does not require different fact-finders and different burdens of proof for Section 924(e)'s various requirements." *Santiago*, 268 F.3d at 157.

C. The Rule Of Lenity Does Not Compel Adoption Of Petitioner's Construction

Petitioner contends (Pet. Br. 35-37) that the rule of lenity requires holding that ACCA applies only to convictions under generic burglary statutes and convictions for predicate offenses obtained after jury trials.

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indictment and jury-trial requirements of *Apprendi* do not apply to "the fact of a prior conviction," *Cooper*, 375 F.3d at 1052 n.3; *Sanders*, 377 F.3d at 847 n.3, but neither indicates that "the fact of a prior conviction" should be read narrowly. Indeed, *Cooper* rejected the argument that *Apprendi* required jury factfinding about whether the defendant was actually the person named in prior convictions. 375 F.3d at 1053.

Although petitioner's argument is unclear, it appears that petitioner does not contend that ACCA itself is ambiguous; rather, he contends that to the extent that "the Massachusetts [state] breaking and entering statutes * * * are ambiguous as to whether they constitute generic crimes," under the rule of lenity, "they [should] be interpreted as non-generic crimes and no further inquiry would be required." Pet. Br. 36. That argument lacks merit.

The rule of lenity has no application here because this case does not involve the construction of ambiguous statutes. See *Albernaz* v. *United States*, 450 U.S. 333, 343 (1981) ("the rule of lenity simply has no application" where court is "not confronted with any statutory ambiguity"). There is no need to construe the Massachusetts state statutes in this case (even if federal courts could do so authoritatively): the prohibitions and penalties of the Massachusetts breaking and entering statutes are clear and well established. Petitioner points to no provision of ACCA that he contends is ambiguous so as to permit the rule to be invoked here, and ACCA's language does not itself prescribe procedures for the imposition of the enhancement. Sentencing Guidelines § 4B1.4, comment. (n.1) ("the procedural steps relative to the imposition of an enhanced sentence under 18 U.S.C. § 924(e) are not set forth by statute"). Moreover, this Court in *Taylor* has already construed ACCA to permit sentencing courts to consider charging instruments in order to determine whether a conviction by jury under a statute that covered both generic and nongeneric burglary was a conviction for generic burglary, and petitioner identifies no textual basis for drawing a different conclusion here. The *Taylor* Court did not suggest that it was unclear whether the language of ACCA would permit such a procedure. 495

U.S. at 602. The Court's failure to consider the rule in that context is a strong indication it believed the rule was not implicated, because the Court twice specifically addressed whether the rule of lenity played any role in determining the meaning of the word "burglary" in the statute. *Id.* at 596, 598.

D. The Continuing Validity Of *Almendarez-Torres* Is Not Before This Court

Amicus the National Association of Criminal Defense Lawyers contends (Br. 6-22) that *Almendarez-Torres*, *supra*, was wrongly decided. NACDL further contends that the decision has been undercut by *Apprendi*, *supra*, and its progeny, and that this Court should overrule the decision. For several reasons, this Court should decline that invitation. First, under this Court's Rule 14.1(a), only a question that is "set out in the petition" or "fairly included therein" will be considered by the Court. The petition presents only questions concerning the kinds of materials a sentencing court may consult to determine whether a prior burglary conviction was for a generic burglary, see Pet. i-ii, and specifically indicated that "[n]o constitutional provision is involved" in this case. Pet. 1. Nor is the question "fairly included." Amicus does not contend otherwise, indicating that the validity of *Almendarez-Torres* is an additional issue to be decided "as well as the *Taylor* issue on which certiorari was granted." NACDL Br. 2. See generally *Yee* v. *Escondido*, 503 U.S. 519, 535 (1992) (Court "disregard[s] [this rule] 'only in the most exceptional cases,' where reasons of urgency or of economy suggest the need to address the unpresented question in the case under consideration") (quoting *Stone* v. *Powell*, 428 U.S. 465, 481, n.15 (1976)). Second, petitioner presented no comparable claim in the courts

below. See 02-1216 Pet. C.A. Br. 1-46; 99-2167 Pet. C.A. Br. 1-19. See generally *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). Finally, this Court "do[es] not ordinarily address issues raised only by *amici*." *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991). There is no reason for the Court simultaneously to depart from all of those sound practices in this case.

In any event, the Court in *Apprendi* was correct in declining to disturb *Almendarez-Torres*. As the Court stressed in *Almendarez-Torres*, that case involves recidivism, which is "as typical a sentencing factor as one might imagine." 523 U.S. at 230 (citing, among other statutes, 18 U.S.C. 924(e)). Principles of notice and fundamental fairness do not require that prior convictions be alleged in the indictment or found by a jury in order for the defendant to be sentenced to a longer term as a recidivist. A defendant cannot claim surprise concerning the fact of a prior conviction, because he previously underwent the criminal process that led to the judgment.

In addition, as the Court observed in *Apprendi*, "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt"—which *Almendarez-Torres* permits—and allowing a judge rather than a jury to find in the first instance facts that "relate to the commission of the offense itself." 530 U.S. at 496 (internal quotation marks omitted). Indeed, "unlike virtually any other consideration used to en-

large the possible penalty for an offense, * * * a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones*, 526 U.S. at 249; accord *Apprendi*, 530 U.S. at 488 (noting "certainty" in *Almendarez-Torres* that "procedural safeguards attached to any 'fact' of prior conviction"). Extension of *Apprendi* to the fact of prior convictions also would disserve future defendants' interests by bringing their prior criminal misconduct to the attention of jurors. "As this Court has long recognized, the introduction of evidence of a defendant's prior crimes risks significant prejudice." *Almendarez-Torres*, 523 U.S. at 235; *Old Chief* v. *United States*, 519 U.S. 172, 185 (1997) ("there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant"); *Spencer* v. *Texas*, 385 U.S. 554, 560 (1967) (evidence of prior crimes "is generally recognized to have potentiality for prejudice"); cf. also *id.* at 563-564 (Due Process Clause does not require bifurcated proceeding when jury resolves recidivist sentencing issues).

Finally, this Court has repeatedly denied review in cases that (unlike this case) fairly presented the question whether *Almendarez-Torres* should be overruled in light of *Apprendi*, most recently just two weeks before the writ of certiorari was granted in this case.[16]

[16] See, *e.g.*, *Pineda-Cortes* v. *United States*, 124 S. Ct. 2813 (2004) (No. 03-9287); *Garza-Garza* v. *United States*, 124 S. Ct. 2096 (2004) (No. 03-8730); *Garcia-Saldivar* v. *United States*, 124 S. Ct. 2067 (2004) (No. 03-8536); *Meza-Gonzalez* v. *United States*, 124 S. Ct. 2017 (2004) (No. 03-8468); *Sanchez-Medina* v. *United States*, 124 S. Ct. 1655 (2004) (No. 03-7510); *Lapsley* v. *United States*, 124 S. Ct. 1409 (2004) (No. 03-7331); *Jones* v. *United States*, 124 S. Ct. 1145 (2004) (No. 03-6784); *Hitt* v. *Kansas*, 537 U.S. 1104 (2003) (No. 01-10864); *Bradshaw* v. *United States*, 537 U.S. 1049 (2002) (No. 02-5015); *Hagen* v. *United States*, 537 U.S. 828 (2002) (No. 01-9064); *Gray* v. *United States*, 536 U.S. 963 (2002) (No. 01-8724); *Luzardo* v. *United States*, 536 U.S. 962 (2002) (No. 01-6491); *Lozano-Ortiz* v. *United States*, 535 U.S. 1113 (2002) (No. 01-8092); *Ford* v. *United States*, 535 U.S. 1098 (2002) (No. 01-7399); *Bulgin* v. *United States*, 535 U.S. 1095 (2002) (No. 01-742); *Reyes* v. *United States*, 535 U.S. 932 (2002) (No. 01-6151).

Under the circumstances, it would be extraordinary for this Court to address a question of such potential significance—which could affect tens of thousands of sentences—in a case in which the question was not raised in the petition for a writ of certiorari (or even in petitioner's merits brief), and when the question has not been the subject of full briefing by the parties.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2004